

ABDUL RAHIM BIN AKI @ MOHD HAKI

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v.

KRUBONG INDUSTRIAL PARK (MELAKA) SDN. BHD. & 5 ORS.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA BTE YAAKOB JCA
DATO' HJ. ABU MANSOR BIN ALI JCA
[CIVIL APPEAL NO. M-01-22-95]
16 MAY 1995

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COMPANY LAW: *Rights of minority - Derivative action - Whether for the benefit of the company - Procedural prerequisites - Whether representative capacity of action to be shown - Parties - Failure to name wrongdoers and company as parties to action - Whether fatal - Consideration of Foss v. Harbottle.*

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COMPANY LAW: *Rights of minority - Derivative action - Fraud upon the minority - Whether could be equated with common law fraud.*

PRACTICE & PROCEDURE: *Order 28 r. 8(1) Rules of the High Court 1980 - Originating summons - Dismissal of - Application to continue summons as writ action - Whether a matter of Court's discretion - Factors to be consideration.*

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PRACTICE & PROCEDURE: *Parties - Non-joinder of proper parties to action - Whether fatal - Late application to name parties - Whether to be allowed.*

The appellant is a minority shareholder of Tunas Murni Sdn. Bhd. (Tunas Murni) holding 46.7% of the shares therein. Disputes arose in respect of certain dealings which Tunas Murni had with the first respondent (Krubong), whereby three pieces of land belonging to Tunas Murni were caused to be transferred to Krubong. The appellant alleged that the other two directors of Tunas Murni (Thomas and Wong Akau), by the said dealings, had misconducted themselves to the detriment of Tunas Murni, and together with Krubong, had been in breach of their fiduciary duty to Tunas Murni. In the circumstances the appellant took a minority shareholder's action in his own name against the respondents, seeking for various reliefs and declarations. In so doing, however, the appellant had not named Thomas as a party. The learned Judicial Commissioner found that no common law fraud had been perpetrated by the respondents and hence dismissed the action. The appellant appealed. In the appeal the appellant, however, did not name Tunas Murni as one of the respondents. Before the Court of Appeal the primary issues that arose were (1) whether the appellant's action herein was improperly constituted and therefore ought to be dismissed, and (2) if so, whether the Court below in dismissing the appellant's suit the way it did, adverted to valid and proper grounds.

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Held:

Per Gopal Sri Ram JCA (Siti Norma Yaakob and Abu Mansor Ali JJCA concurring):

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[1] In cases where a declaration is sought for, except in very exceptional circumstances, all persons interested should be made parties, whether by representation or otherwise. No such special circumstances exist in the instant case. The failure to add Thomas as a co-defendant to the main action and the failure to add Tunas Murni as a respondent to the appeal were serious impediments that stood in the way of the appellant's success before

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a this Court. Clearly, the success or failure of the appellant's case depends very much upon whether he can make out the case alleged against Thomas. The non-joinder of Thomas must therefore be fatal to the action.

b [2] The intitlement of the appellant as plaintiff in his personal capacity in what purports to be a derivative action herein is clearly wrong. The facts as alleged, even if true, do not support the cause of action relied upon by the appellant. The facts do not appear to fall squarely within a minority shareholder's action on the ground that there had been fraud on the minority. These apart, the relief claimed does not appear to fit the fact alleged. The erroneous cause of action, coupled with the procedural obstacles, must constitute sufficient ground for the dismissal of the appeal.

c [3] The eleventh hour attempt to cite Tunas Murni as a respondent to the appeal herein cannot be allowed. There was delay in making the application for which no satisfactory explanation was given. Also granting the application would have involved granting the appellant leave to appeal against Tunas Murni out of time, an adjournment of the appeal to enable service of the amended notice of appeal to be effected on all parties and the filing and service of fresh records of appeal. The factors against the grant of the orders far outweighed those in favour of the grant.

d [3] A derivative action is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs, and will not, for that reason permit an action to be brought in its name. In these circumstances a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. But in so doing he must cite the company and the wrongdoers as defendants and the title to the action
e must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so, and further, there must be an express statement in the pleading that the action is being brought for the benefit of the company. A plaintiff in a derivative action cannot thus sue in his own name, without
f indicating that he is bringing the action in a representative capacity and for the benefit of the company.

g [4] The statement of the law upon the subject of minority shareholders' actions by the learned Judicial Commissioner was flawed as what he did was to equate common law fraud with the expression "fraud upon a minority". The expression "fraud upon a minority" has nothing to do with actual fraud or deception at common law. Although lack of probity comes within the expression, it is not necessary for the minority shareholder to prove dishonesty. It is sufficient if he can show that those wielding majority control abused the powers vested in them, in the sense that they used or omitted to use their powers for an oblique purpose and not for the purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law.

h [5] The application by the appellant to have the summons restored to file and for a direction that the same be prosecuted as a writ action cannot be allowed, notwithstanding the provisions of O. 28 r. 8(1). There are too many things wrong with this action in the way it is presently constituted. In the event it is best that the appellant files a fresh action by way of a writ.

i [Appeal dismissed but on grounds different from those adverted to by the Court below].

[Bahasa Malaysia Translation of Headnotes]

UNDANG-UNDANG SYARIKAT: Hak-hak pemegang saham minoriti - Tindakan terbitan - Samada seharusnya untuk kepentingan syarikat - Prasyarat prosedur - Samada sifat wakil harus ditunjukkan - Pihak-pihak - Kegagalan menamakan pelakusalah dan syarikat sebagai pihak kepada tindakan - Samada memudaratkan - Pertimbangan Foss v. Harbottle.

UNDANG-UNDANG SYARIKAT: Hak-hak pemegang saham minoriti - Tindakan terbitan - Fraud terhadap minoriti - Samada boleh disamakan dengan fraud di sisi common law.

AMALAN & PROSEDUR: Aturan 28 k. 8(1) Kaedah-kaedah Mahkamah Tinggi 1980 - Saman Pemula - Pengenepian - Permohonan untuk meneruskan saman sebagai tindakan writ - Samada perkara budibicara Mahkamah - Faktor-faktor yang perlu dipertimbangkan.

AMALAN & PROSEDUR: Pihak-pihak - Kegagalan mencantumkan pihak yang betul ke dalam tindakan - Samada fatal - Permohonan lewat untuk menamakan pihak-pihak - Samada boleh dibenarkan.

Perayu adalah pemegang saham minoriti dalam syarikat Tunas Murni Sdn. Bhd. (Tunas Murni) memegang sebanyak 46.7 % saham didalamnya. Pertelingkahan telah timbul akibat dari transaksi yang dimasuki di antara Tunas Murni dengan responden pertama (Krubong), di mana, sebagai ekorannya, tiga bidang tanah milik Tunas Murni telah dipindahmilikkan kepada Krubong. Perayu membuat pengataan bahwa pengarah Tunas Murni yang dua lagi (Thomas dan Wong Akau), melalui transaksi berkenaan, telah membuat salah laku dengan cara yang memudaratkan Tunas Murni, dan bersama-sama dengan Krubong, telah melanggar kewajiban fidusiari mereka terhadap Tunas Murni. Perayu, oleh hal yang demikian, mengambil satu tindakan pemegang saham minoriti terhadap responden-responden atas namanya sendiri, memohon beberapa relif dan perisytiharan. Bagaimanapun, dalam tindakannya itu perayu tidak menamakan Thomas sebagai satu pihak. Pesuruhjaya Kehakiman yang bijaksana mendapati bahwa melalui transaksi berkenaan responden tidak melakukan apa-apa fraud di sisi common law, dan dengan itu, menolak tindakan perayu. Perayu merayu. Didalam rayuannya, bagaimanapun, perayu tidak menamakan Tunas Murni sebagai responden. Di hadapan Mahkamah Rayuan persoalan penting yang timbul ialah (1) samada tindakan perayu di sini tidak dikemukakan dengan teraturnya dan dengan itu harus diketepikan, dan (2) jika demikian, samada Mahkamah di bawah, dalam mengenyepikan tindakan perayu, berbuat demikian dengan alasan yang betul.

Diputuskan:

Oleh Gopal Sri Ram HMR (Siti Norma Yaakob dan Abu Mansor Ali HHMR menyetujui):

[1] Di dalam kes-kes dimana perisytiharan dipohon, kecuali dalam beberapa keadaan yang khas, kesemua orang yang berkepentingan hendaklah dinamakan sebagai pihak kepada tindakan, samada sebagai wakil atau sebaliknya. Tidak ada keadaan khas yang wujud di sini. Kegagalan menamakan Thomas sebagai defendan bersama dalam tindakan pokok beserta dengan kegagalan menamakan Tunas Murni sebagai responden dalam rayuan yang dibuat selepasnya, adalah penghalang besar kepada kejayaan perayu di hadapan Mahkamah ini. Jelas, bahawa kejayaan atau kegagalan kes perayu sangat bergantung kepada samada beliau boleh membuktikan kesnya terhadap Thomas. Kegagalan mencantumkan Thomas sebagai satu pihak, oleh itu, adalah fatal kepada tindakan berkenaan.

[2] Penajukkan perayu sebagai plaintif dalam kapasiti peribadi dalam satu tindakan yang ditonjolkan sebagai tindakan terbitan adalah salah. Fakta-fakta seperti yang dibentangkan, jikapun benar, tidak menyokong kausa tindakan sepertimana yang dipilih oleh perayu.

a Fakta-fakta juga tidak bertepatan dengan suatu tindakan pemegang saham minoriti atas alasan bahawa terdapat perlakuan fraud ke atas minoriti. Di samping itu, relif yang dituntut tidak selari dengan fakta yang dikemukakan. Kausa tindakan yang cacat sebegini, ditambah dengan halangan prosedur, menjadi alasan mencukupi bagi menolak rayuan ini.

b [3] Apabila menajukkan suatu tindakan terbitan, pemegang saham minoriti mestilah menamakan pelakusalah dan syarikat sebagai defendan, dan tajuk tindakan itu juga mestilah menjelaskan bahawa tindakan tersebut dibuat dalam kapasiti wakil. Penyata tuntutan atau pliding-pliding lain yang dikemukakan untuk menyokong proses pemula tersebut mestilah menyebut bahawa ianya adalah satu tindakan terbitan, sambil membentangkan fakta-fakta yang menjadikannya begitu, dan selanjutnya, mestilah dijelaskan dengan terang bahawa tindakan tersebut dibuat untuk kepentingan syarikat yang terbabit. Seorang plaintif, oleh yang demikian, tidak boleh menuntut atas namanya sendiri, *c* tanpa menerangkan bahawa beliau bertindak sebagai wakil dan untuk kebajikan syarikat.

[4] Pernyataan undang-undang oleh yang arif Pesuruhjaya Kehakiman berhubung subjek tindakan pemegang saham minoriti adalah cacat oleh kerana apa yang beliau lakukan ialah menyamakan fraud di dalam common law dengan “fraud upon a minority”. Expressi “fraud upon a minority” tidak kena mengena dengan “actual fraud or deception at common law”. *d* Walaupun ketiadaan kejujuran termasuk dalam expressi ini, adalah tidak perlu bagi pemegang saham minoriti membuktikan “dishonesty”. Adalah memadai jika dia dapat membuktikan bahawa mereka yang memegang tampok kuasa majoriti telah menyalahgunakan kuasa tersebut, dalam ertikata mereka menggunakan kuasa tersebut untuk tujuan yang tidak wajar dan tidak mengikut tujuan sepertimana yang diperuntukkan oleh “memorandum and articles of association” syarikat, statut atau pun undang-undang am.

e [5] Permohonan perayu untuk memulihkan samannya dan untuk perintah bahawa samannya itu diteruskan sebagai satu tindakan writ tidak dapat dibenarkan, walaupun setelah mengambil kira peruntukan A. 28 k. 8(1). Terlalu banyak kesilapan yang berlaku dalam tindakan ini menurut cara ianya dikemukakan. Oleh hal yang demikian jalan terbaik ialah membenarkan perayu memfailkan satu tindakan writ yang baru.

f [Rayuan dibenarkan, tetapi atas alasan yang berbeza dari apa yang diputuskan oleh Mahkamah di bawah].

Cases referred to:

- Alor Jangus Soon Seng Trading Sdn. Bhd. & Ors. v. Sey Hoe Sdn. Bhd. & Ors* [1995] 1 MLJ 241 (*dist*)
- London Passenger Transport Board v. Moscrop* [1942] AC 332 (*fol*)
- g Hospital Products Ltd. v. United States Surgical Corporation* [1984] 55 ALR 417 (*refd*)
- Royal Brunei Airlines Sdn. Bhd. v. Tan Kok Ming Philip* [1995] 3 MLJ 74 (*refd*)
- Foss v. Harbottle* [1843] 67 ER 189 (*refd*)
- Mozley v. Alston* [1847] 41 ER 833 (*refd*)
- Bamford v. Bamford* [1970] Ch. 212 (*refd*)
- Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204 (*refd*)
- Edwards v. Halliwell* [1950] 2 All ER 1064 (*refd*)
- h Tan Guan Eng & Anor. v. Ng Kweng Hee & Ors.* [1992] 1 MLJ 487 (*fol*)
- MacDougall v. Gardiner* [1875] 1 Ch. D 13, 21 (*refd*)
- Burland v. Earle* [1902] AC 83, 93 (*refd*)
- Wallersteiner v. Moir (No. 2)* [1975] QB 373 (*not fol*)
- Australian Coal & Shale Employees Federation v. Smith* [1938] 38 SR (NSW) 48 (*fol*)
- Davis v. The Commercial Publishing Company of Sydney Ltd.* [1901] 1 SR (NSW) 37 (*refd*)
- i New South Wales Wood Process Ltd. v. Gorton* [1915] 15 SR (NSW) 454 (*refd*)
- Atherton v. The Plane Creek Central Mill Co. Ltd.* [1914] QSR 73. (*refd*)

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Eastmanco (Kilner House) Ltd. v. Greater London Council [1982] 1 All ER 437 (foll)

Biala Pty. Ltd. v. Mallina Holdings Ltd. (No. 2) [1993] 11 ACLC 1082 (foll)

Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Legislation referred to:

Companies Act 1965, s. 181

National Land Code, 1965, s. 340

Rules of the High Court, O. 28 r. 8(1)

For the appellant - B. Thangaraj; M/s. Thangaraj & Assoc.

For the first, second, third respondents - Wong Kim Fatt (Manian Raju with him); M/s. Gunaretnam & Co.

For the fourth respondent - Abdul Rahman Putra; State Legal Adviser, Melaka

For the fifth and sixth respondents - Hira Singh, (Wong Kim Fatt & C.Y. Chung with him); M/s. K.C. Yap Kamaludin & Partners.

For the respondent on the motion to add (Tunas Murni Sdn. Bhd.) - Zainur Zakaria; M/s. Zainur Zakaria & Co.

JUDGMENT

Gopal Sri Ram JCA:

The appellant before us is a shareholder of Tunas Murni Sdn. Bhd. (“Tunas Murni”). Initially, he commenced an action against the respondents using Tunas Murni’s name as plaintiff. That action was not supported by a majority of the board of directors. The respondents before us (defendants in that earlier suit) applied to strike out the action. They succeeded. The appellant then brought a second action by originating summons. He claimed that it was a derivative action. He joined the company as a co-defendant and claimed a whole range of declaratory relief. In the environment of company law it is commonly called a minority shareholder’s action. We will say something more about such actions later in this judgment.

The instant respondents resisted the second action. They argued, *inter alia*, that it was in substance not a derivative action at all because it lacked the elements of such an action. The learned Judicial Commissioner dismissed the action solely on the ground that common law fraud had not been established and that consequently the title of the first respondent was indefeasible. It is against this decision that the present appeal has been brought. After hearing Counsel for the appellant we did not consider it necessary to trouble Counsel for the respondents for a reply. We agreed with Counsel for the appellant that the Judicial Commissioner arrived at his decision for the wrong reasons. But we upheld his order nevertheless because we formed the view that his ultimate decision was correct. So that *res judicata*, should not be even suggested, we gave the appellant liberty to commence a fresh action by writ. The reasons for our decision now follow.

At the outset, we wish to make it clear that because of the orders we made on this appeal, it is desirable that we say as little as possible about the facts or the substantial merits of the case. This is to avoid our remarks being misunderstood as amounting to the pronouncement of a concluded view upon these matters. They are certainly not intended to have that effect. However, in order to appreciate the true legal position it is necessary to allude to some of the salient facts.

As earlier observed, the appellant is a shareholder of Tunas Murni. He owns 46.7% of its shares. There are two other shareholders. They are the second respondent who owns 15.9% and one George Thomas (“Thomas”) who owns 37.4%. At present the appellant

a and Thomas are the only directors of the board of Tunas Murni. The second respondent was at one time a member of the board but subsequently resigned.

At all material times, Tunas Murni was the registered proprietor of three pieces of land which it had purchased from the previous registered proprietor. These lands stand at the heart of the present dispute.

b On 8 June 1993, an agreement was entered into between Tunas Murni and the first respondent under the terms of which the former appointed the latter to arrange for the subdivision and development of the lands in question. On the same date, it executed an irrevocable power of attorney in favour of the first respondent. Later, the lands were transferred to the first respondent.

c As earlier observed, the appellant in his summons asked for several declarations and orders which in essence attack the aforesaid transfer. The complaints range from defeasibility of the first respondent's registered title to serious allegations of impropriety directed against the first, second and third respondents as well as Thomas. Despite all this, Thomas was not added as a party to the action. On appeal, Tunas Murni was not cited as a respondent. An eleventh hour attempt to add it as a respondent to the appeal was vigorously opposed by the respondents.

d Whether the addition ought to be permitted was a matter within our discretion. Taking into account all the relevant circumstances, we formed the view that the motion ought to be refused.

e There was some delay in making the application for which no satisfactory explanation was given. Also, allowing the application would have meant granting the appellant leave to appeal against Tunas Murni out of time, an adjournment of the appeal to enable service of the amended notice of appeal to be effected on all parties and the filing and service of fresh records of appeal. The factors against the grant of the orders sought by the appellant in his motion to this Court far outweighed those operating in favour of the grant.

f In our judgment, the failure to add Thomas as a co-defendant to the main action and the failure to add Tunas Murni as a respondent to the appeal were serious impediments that stood in the way of the appellant's success before this Court. In order to overcome the difficulty in which he found himself, the appellant relied on the decision of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors. v. Sey Hoe Sdn. Bhd. & Ors.* [1995] 1 MLJ 241. But a close examination of that case shows that the factual matrix upon which that decision was based is very different from that obtaining in the present appeal. Thus, unlike *Alor Janggus*, the director who was not joined as a party is one whose conduct has been assailed on the footing that he had breached the trust and confidence reposed in him as a fiduciary. The success or failure of the appellant's case depends very much upon whether he can make out the case alleged against Thomas.

g We think that the answer to the appellant's contention that the action is properly constituted and may proceed notwithstanding the non-joinder of the alleged defalcating director is to be found in the following passage in the speech of Viscount Maugham in *London Passenger Transport Board v. Moscrop* [1942] AC 332, 345:

h I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the Court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in

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the action. It is true that in their absence they were not strictly bound by the declaration, but the Courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the Court in their absence, and that **except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise before a declaration by its terms affecting their rights is made.** In the Chancery Division, in which this case started, the rule would seem to be almost invariable, and the well-established practice in actions by shareholders and debenture holders may be mentioned as instances of the rule. With the greatest respect for the Court of Appeal, I think that the amended declaration pronounced by that Court, even if the section were applicable, ought not to have been made. (Emphasis added.)

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These words though spoken in the context of declaratory relief are of general application.

As far as the instant appeal is concerned, we need say no more than that the very special circumstances spoken of by Viscount Maugham are absent in the present case. Consequently, we are unable to accede to the submission of Counsel in this respect.

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Now, when he began his argument on the appeal, Counsel for the appellant informed us that this matter had commenced as a rather simple summons for construction of a power of attorney. Somewhere along the way, he said, it had ballooned into an action by a minority shareholder of a company. But an examination of the record shows that it was the appellant who seems to have put the question in issue in his written submissions filed in support of the summons. In consequence, it would appear that he had opened a door through which the respondents drove a coach and four. There was, in reply to his argument, addressed a whole host of submissions touching upon the quantum of proof required under the fraud exception contained in s. 340 of the National Land Code, 1965 and the ingredients that go to make up a derivative action. The nett result was that in the cloud of dust that the ingenuity of Counsel had created, all concerned, including the Court, lost sight of the proverbial wood from the trees. If the learned Judicial Commissioner had kept in mind the relevant principles applicable to the case before him, he would not have succumbed to the error of dealing with the dispute as a case requiring the proof of actual fraud for the displacement of a registered title.

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But these matters aside, and without going into the matter in any great detail, it suffices for us to say that the affidavits delivered in the Court below disclose serious disputes of fact on all material issues raised by the appellant, including the nature of the entire transaction, its aim and purpose. And it emerged during argument that the essence of the appellant's complaint turned upon alleged breaches of the fiduciary duty owed to the company by the first and second respondents and by Thomas.

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If, as submitted by Counsel, the first respondent, in breach of trust, is exploiting the lands in question and reaping huge profits therefrom; that this has been made possible by the acts of the second respondent and Thomas as accessories to that breach; that these profits belong in equity to Tunas Murni, then, it is for the appellant to pursue the appropriate remedy. In this context, it is sufficient for us to refer to the decision of the High Court of Australia in *Hospital Products Ltd. v. United States Surgical Corporation* [1984] 55 ALR 417, 462; [1984] 156 CLR 41, 107 and that of the Privy Council in *Royal Brunei Airlines Sdn. Bhd. v. Tan Kok Ming Philip* [1995] 3 MLJ 74. In the former case, the following passages in the dissenting judgment of Mason J ([1984] 55 ALR at page 462; [1984] 156 CLR at page 107) are of particular relevance:

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a Relief for Breach of Fiduciary Duty

(a) General Principle Governing Liability to Account

The principle, accepted by the Court below, is that the fiduciary cannot be permitted to retain a profit or benefit which he has obtained by reason of his breach of fiduciary duty (*Consul Development* (132 CLR) at 393; *Queensland Mines* (18 ALR) at 4; (52 ALJR) at 401). A fiduciary is liable to account for a profit or benefit if it was obtained (1) in circumstances where there was a conflict, or possible conflict of interest and duty, or (2)

b by reason of the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position.

(b) Constructive Trust

c Any profit or benefit obtained by a fiduciary in either of the two situations already described is held by him as a constructive trustee (*Keith Henry & Co Pty Ltd v. Stuart Walker & Co Pty Ltd* [1958] 100 CLR 342 at 350). Neither principle nor authority provide any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty. Once it is established that the fiduciary is liable to account for a profit or benefit which he has

d obtained there can be no objection to his being held to account as a constructive trustee of that profit or benefit. It can make no difference that it was not his duty to obtain the profit or benefit for the person to whom the duty was owed. What is important is that the advantage has accrued to him in breach of his fiduciary duty or by his misuse of his fiduciary position. The consequence is that he must account for it and in equity the appropriate remedy is by means of a constructive trust.

e We hasten to add that our remarks upon this part of the case are not for a moment to be taken as stating that an action mounted on the suggested basis will succeed. All we wish to say is that the facts as alleged in the affidavits, if true, do not support the cause of action presently relied upon by the appellant.

f The procedural obstacles we spoke of earlier and the view we take of the erroneous cause of action pursued by the appellant, namely, the reconveyance of the lands to Tunas Murni constitute sufficient grounds for the dismissal of the appeal. Unfortunately, as earlier observed, there are some passages in the judgment of the learned Judicial Commissioner which, if left uncommented upon, may lead one to believe that we agree with his statement of the law upon the subject of minority shareholders' actions. This is certainly not the case and we owe it to the efforts of Counsel for both sides to restate the law governing such actions.

g We begin with the rule in *Foss v. Harbottle* [1843] 67 ER 189. The rule has two limbs. The first limb of the rule - and the present appeal has nothing to do with its application - is that a Court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v. Alston* [1847] 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v. Bamford* [1970] Ch. 212.

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i The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the

injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no *locus standi* to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982] Ch. 204.

Perhaps the clearest statement of the rule is to be found in the judgment of Jenkins LJ in *Edwards v. Halliwell* [1950] 2 All ER 1064, 1066:

The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*.

There are several exceptions to the rule in *Foss v. Harbottle* (*supra*), both as a result of case law and through the intervention of Parliament. For present purposes, there are two exceptions that call for detailed discussion. We will refer to these later in this judgment.

The several exceptions to the rule in *Foss v. Harbottle* that are the product of case law appear in the illuminating judgment of Edgar Joseph Jr. J (now FCJ) in *Tan Guan Eng & Anor. v. Ng Kweng Hee & Ors.* [1992] 1 MLJ 487, 502. It is an important decision in the field of company law and in it there are set out several propositions that clarify the position in an area of the law that is not altogether free from difficulty. The exceptions referred to by his Lordship in that case are as follows:

- (1) *Ultra vires* acts: 'in cases where the acts complained of are wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority'.
- (2) Fraud on the minority: 'where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as 'a minority shareholders' action on behalf of themselves and all others'.
- (3) Special majorities: 'an individual member [is not] prevented from suing if the matter ... [is] one which could validly be done or sanctioned, not by a simple majority of the members ... but only by some special majority'.
- (4) Personal rights: Where 'the personal and individual rights of members of [the plaintiffs] have been invaded', the rule 'has no application at all'.
- (5) When the justice of the case requires it, though this has been doubted by the English Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries* (No. 2).

For completeness, we refer to the statutory exception. This is to be found in the far reaching and extremely beneficial remedy housed in s. 181 of the Companies Act, 1965. It may, on reflection, be inaccurate to refer to it as an exception of the rule now under consideration. In truth it is an abrogation of the rule itself in those circumstances to which the section applies.

We now turn to consider the one exception with which this case is concerned. It is the derivative action; an ingenious procedural device created by Court of equity by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control

- a* of its decision making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it
- b* is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

- The juridical basis upon which the Court entertains such an action is that the majority who have either *de facto* or *de jure* control of the company have by commission or
- c* omission committed what is described as “a fraud upon a minority”. It is the second category of case mentioned by Edgar Joseph Jr. J in *Tan Guan Eng (supra)*. The principle was stated by James LJ in *MacDougall v. Gardiner* [1875] 1 Ch. D 13, 21 where he said:

- d* I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley v. Alston* and *Lord v. Copper Miners’ Company* and *Foss v. Harbottle* should be always adhered to; that is to say, that **nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent - unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it;** but that every litigation must be in the name of the
- e* company, if the company really desire it. Because there may be a great many wrongs committed in a company - there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from
- f* being done. (Emphasis added.)

In *Burland v. Earle* [1902] AC 83, 93, Lord Davey, when delivering the advice of the Privy Council expressed the proposition in the following words:

- g* It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* and *Mozley v. Alston*, and in numerous later cases which it is unnecessary to cite. **But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an**
- h* **action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the**
- i* **shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which**

the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works* [1874] LR 9 Ch. 350. (Emphasis added.)

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The decision of the English Court of Appeal in *Wallersteiner v. Moir* (No. 2) [1975] QB 373 is regarded by leading textbook writers as the high-level watermark of the law and procedure governing derivative actions in the sphere of company law. Lord Denning there traced its history and scope. He said (at page 390 of the report):

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It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v. Harbottle* [1843] 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress. In *Foss v. Harbottle*, 2 Hare 461, 491-492, Sir James Wigram VC saw the problem and suggested a solution. He thought that the company could sue 'in the name of some one whom the law has appointed to be its representative.' A suit could be brought 'by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, ...

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This suggestion found its fulfilment in the *Merryweather* case (The reference here is to *Atwool v. Merryweather*) which came before Sir William Page Wood VC on two occasions: see [1864] 2 Hem. & M. 254 (*sub nom. East Pant Du United Lead Mining Co. Ltd. v. Merryweather*) and L.R. 5 Eq. 464n. It was accepted there that the minority shareholders might file a bill asking leave to use the name of the company: see 2 Hem. & M. 254, 259; LR 5 Eq. 467-468n. If they showed reasonable ground for charging the directors with fraud, the Court would appoint the minority shareholders as representatives of the company to bring proceedings in the name of the company against the wrongdoing directors. By that means the company would sue in its own name for the wrong done to it. That would be, however, a circuitous course, as Lord Hatherley LC said himself, at any rate in cases where the fraud itself could be proved on the initial application.

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To avoid the circuitry, Lord Hatherley LC held that the minority shareholders themselves could bring an action in their own names (but in truth on behalf of the company) against the wrong-doing directors for the damage done by them to the company, provided always that it was impossible to get the company itself to sue them. He ordered the fraudulent directors in that case to repay the sums to the company, be it noted, with interest: see LR 5 Eq. 469n. His decision was emphatically approved by this Court in *Menier v. Hooper's Telegraph* [1874] 9 Ch. App. 350 and *Mason v. Harris* [1879] 11 Ch.D. 97. The form of the action is always 'A. B. (a minority shareholder) on behalf of himself and all other shareholders of the company' against the wrongdoing directors and the company. That form of action was said by Lord Davey to be a 'mere matter of procedure in order to give a

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a remedy for a wrong which otherwise would escape redress': see *Burland v. Earle* [1902] AC 83, 93. Stripped of mere procedure, **the principle is that, where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders on the footing that they are its representatives to obtain redress on its behalf.**

b I am glad to find this principle well stated by Professor Gower in *Modern Company Law*, 3rd ed. (1969), p. 587, in words which I would gratefully adopt:

c Where such an action is allowed, the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself. Although ... he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The plaintiff shareholder is not acting as a representative of the other shareholders, but as a representative of the company... In the United States ... this type of action has been given the distinctive name of a 'derivative action,' recognising that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it.

d As it happens in the present case the formula has been discarded. The counterclaim by Mr. Moir was prepared by a careful, learned and skilful member of the bar, Mr. William Stubbs. It is not headed 'on behalf of himself and all the other shareholders.' It is just headed 'M.J.G. Moir, plaintiff on counterclaim.' The two companies were made parties by being added to the counterclaim. The prayer is: 'Mr. Moir counterclaims for' several declarations of wrongs done to the two companies and orders on Dr. Wallersteiner to pay specified sums to the two companies, and that he do pay the costs of Mr. Moir and the two companies. **No objection has been taken to that form of proceeding. No suggestion has been made that it should be amended. Quite right. Let it stand as it is. It is in accord with principle.** (Emphasis added.)

e With the first of the two passages upon which we have placed emphasis, no quarrel may be had. For it accurately summarises the law as it had been stated and developed by earlier Courts whose decisions are entitled to the greatest of respect. But with regard to the latter passage to which we have lent emphasis, we are with great respect, unable to agree with Lord Denning that the practice there followed by the counterclaiming defendant " accords with principle". It does not.

f We think it important not to overlook the fact that in that case Counsel for Dr. Wallersteiner did not raise any objections to Mr. Moir's failure to correctly intitle his counterclaim: nor did he suggest an amendment. But that failure could not and, with respect to the Master of the Rolls, did not render the form of proceeding there adopted to be in accordance with the principles governing a derivative action.

g In our judgment, the derivative action has not reached a stage where a plaintiff may disregard its procedural elements. We emphasize that it is not permissible for a plaintiff in a derivative action to sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder. The correct position in law is that stated by Jordan CJ (NSW) in *Australian Coal & Shale Employees Federation v. Smith* [1938] 38 SR (NSW) 48, 54:

h Thus, if the wrongdoers control the company and successfully resist all attempts to cause the company to sue, an individual shareholder suing on behalf of himself and all other shareholders except the defendants may sue to remedy the wrong, joining the company as defendant: *Burland v. Earle*.

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See also *Davis v. The Commercial Publishing Company of Sydney Ltd.* [1901] 1 SR (NSW) 37; *New South Wales Wood Process Ltd. v. Gorton* [1915] 15 SR (NSW) 454; *Atherton v. The Plane Creek Central Mill Co. Ltd.* [1914] QSR 73.

It now becomes necessary to deal with the expression “fraud upon a minority” in the context of the exception under discussion. Although the real meaning of the phrase is unclear in the sense that one is unable as yet to determine its boundaries with any precision, an examination of the authorities leaves us to conclude that the following propositions may be taken as settled and beyond question:

- (1) The expression “fraud upon the minority” is a term of art and has absolutely nothing whatsoever to do with actual fraud or deception at common law.
- (2) Lack of probity comes within the ambit of the expression. But it is not necessary to prove dishonesty before a minority shareholder may claim relief under the doctrine.
- (3) It is sufficient for a plaintiff in an action grounded upon the doctrine to show that those wielding majority control abused the powers vested in them in the sense that they used or omitted to use their powers for an oblique or collateral motive or purpose and not for the true purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law.

These propositions are borne out by the following passage in the judgment of Megarry V.C. in *Eastmanco (Kilner House) Ltd. v. Greater London Council* [1982] 1 All ER 437, 445:

It was on the firmly established exception of ‘fraud on a minority’ that Counsel for the applicant mainly relied. It does not seem to have yet become very clear exactly what the word ‘fraud’ means in this context; but I think it is plainly wider than fraud at common law, in the sense of *Derry v. Peek* [1889] 14 App Cas 337, [1886-90] All ER Rep 1. In a valuable survey of the authorities, Templeman J recently came to the conclusion that this head permitted the minority to sue even though there had not been even an allegation of fraud: see *Daniels v. Daniels* [1978] 2 All ER 89, [1978] Ch 406. That was a case in which a husband and wife were the two directors of a company and also the majority shareholders. They caused the company to sell to the wife land owned by the company; and four years later she sold the land for over 28 times what she had paid for it. The Judge refused to strike out the statement of claim of minority shareholders in *Foss v. Harbottle* proceedings against the two directors and the company. The principle which he derived from the cases was that ‘a minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company’ (see [1978] 2 All ER 89 at 96, [1978] Ch 406 at 414). Apart from the benefit to themselves at the company’s expense, the essence of the matter seems to be an abuse or misuse of power. **‘Fraud’ in the phrase ‘fraud on a minority’ seems to be being used as comprising not only fraud at common law but also fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power.** (Emphasis added.)

It is convenient at this stage to deal with the other case law exception to the rule in *Foss v. Harbottle*. It is the fifth category of case referred to by Edgar Joseph Jr. J in *Tan Guan Eng (supra)*. As observed by his Lordship, the English Court of Appeal has frowned upon the creation of yet another exception to the rule based upon the justice of a particular case. However, the reluctance shown by the English tribunal does not appear to be shared by Australian Courts.

- a** In *Biala Pty. Ltd. v. Mallina Holdings Ltd.* (No. 2) [1993] 11 ACLC 1082, a decision of the Supreme Court of Western Australia, Ipp J. expressed a view of the law with which we are inclined to agree. This is what he said (at page 1102 of the report):

Equity is concerned with substance and not form, and it seems to me to be contrary to principle to require wronged minority shareholders to bring themselves within the boundaries of the well-recognised exceptions and to deny jurisdiction to a Court of equity even where an unjust or unconscionable result may otherwise ensue.

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The circumstances of modern commercial life are very different to those which existed when *Foss v. Harbottle* was decided. The body of shareholders of a public company is ordinarily far greater in number, and the controlling minds of individual shareholders are far more difficult to identify than was the case with the relatively small corporations that existed 150 years ago. These developments and the complexities and sophistication of modern shareholding make it often very difficult to bring derivative claims within the established exceptions. To the extent that policy may be relevant in determining whether a fifth and general exception to the rule should be recognised, I consider it to be desirable to allow a minority shareholder to bring a derivative claim where the justice of the case clearly demands that such a claim be brought, irrespective of whether the claim falls within the confines of the established exceptions. In this regard I note the recommendation of the Companies and Securities Advisory Committee reported in the Australian Securities Commission release issued on 2 August 1993 (CASAC 93/02), that the rule in *Foss v. Harbottle* be abolished to allow shareholders and others a general right to bring derivative actions on behalf of companies.

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Accordingly I uphold the argument of the plaintiffs that the Court may allow a derivative action by shareholders in circumstances whenever the justice of the case so requires.

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Returning to the appeal before us, we are satisfied that the learned Judicial Commissioner failed to satisfactorily direct his mind to the correct principles of law that governed the case before him. In his written judgment there is a statement to the effect that the action was unsustainable because there was no case of fraud pleaded by the appellant. What the learned Judicial Commissioner did in effect was to equate common law fraud with the expression “fraud on a minority”. In this, he was clearly wrong. But, as we have earlier observed, the error into which he fell was largely contributed to by the submission of Counsel for the defendants in the Court below.

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It is plain that the appellant and the Court were at cross-purposes at least to some extent upon the nature of the claim that was being pressed. The appellant, before he was side-tracked, based his argument on the doctrine of “fraud upon a minority”. The Court, however, looked for, and unsurprisingly did not find, any allegation of common law fraud, supported by particulars, of a degree sufficient to displace registered title. It was on that basis that the learned Judicial Commissioner found for the respondents. In that respect he erred. But, as we observed at the outset, the totality of the facts disclosed in the appellant’s pleadings and the relief claimed by him do not come within the ambit of the principle contended for so that the order of dismissal was good.

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There is a final point which we must address. Counsel for the appellant submitted that in the light of our disagreement with the reasons advanced by the learned Judicial Commissioner, the proper order that we should make is to restore the summons to file and direct it to be prosecuted as a writ action.

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This Court is certainly empowered to do that by the provisions of O. 28 r. 8(1). But there is a discretion vested in a Court whether to permit the conversion of proceedings commenced by originating summons into a writ action. See, *Cheow Chew Khoo v. Abdul*

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Johari bin Abdul Rahman [1995] 1 MLJ 457. Despite the forceful argument of Counsel we were left uninclined to exercise discretion in the appellant's favour.

There are simply too many things wrong with this action as it is presently constituted. The intitlement of the appellant as plaintiff in his personal capacity in what purports to be a derivative action is wrong. The facts as alleged do not appear to fall squarely within the minority shareholder's action on the ground that there had been fraud on the minority. The relief claimed does not appear to fit the facts alleged. In view of all these matters, we thought it best that the appellant should start with a fresh slate. That is why we gave the appellant liberty to file a fresh action by way of a writ.

For the reasons given, the appeal was dismissed and we made those orders which are usually consequent upon a dismissal.

Abu Mansor bin Ali JCA:

I have had the benefit of reading the judgment in draft of my learned brother, Gopal Sri Ram, JCA with which I am in full agreement. As he said we agree to dismiss this appeal but for a different reason given by the learned Judicial Commissioner who had held that the plaintiff had been unable to prove the high degree of fraud alleged.

For myself I would like to say that because the plaintiffs themselves had not been so clear in what they were claiming and had not brought all the parties they should have had, this factor in a large measure, contributed to the difficulty found by the learned Judicial Commissioner trying this case. He certainly made the best of it and we commend him for that attempt.

No doubt, as the plaintiffs applied, we could have exercised our discretion, to allow the plaintiffs to amend their claim and I agree with my learned brother Judge that, there are so many flaws with the claim that we felt it would certainly be better if the plaintiffs begin all over again and we declined their application that we remit the case down. Whatever is the result, with the judgment of my brother Judge, the plaintiff should, and probably a lot of others as well, now be in a better position to begin this kind of claim which is fraught with difficulties. I hope the next round the plaintiff will be more ready. In the meantime, we confirm the learned Judicial Commissioner's judgment dismissing this appeal for a different reason with cost.